



Report to the Auburn City Council

Action Item
Agenda Item No. 8

City Manager's Approval

To: Honorable Mayor and City Council Members
From: Michael G. Colantuono, City Attorney
Date: June 11, 2012
Subject: Legal representation for Councilmembers in *Connolly v. City of Auburn*

The Issue

Should the Council ratify an agreement executed by the City Manager to retain the law firm of Weintraub, Genshlea, Chediak, Tobin & Tobin to defend the Councilmembers in the matter of *Connolly, First Amendment Coalition v. City of Auburn*?

Conclusions and Recommendations

Counsel for Victoria Connolly and the First Amendment Coalition recently sued the City and each Councilmember to obtain access to Councilmember's personal emails sent or received in email accounts not prepared, owned, used or retained by the City. The Government Code requires the City to defend the Councilmembers in this lawsuit, and I recommend that separate counsel be provided for the Councilmembers while our office defends the City in light of the fact that Councilmembers' personal privacy and free speech rights are in issue. Weintraub, Genshlea is a long-established and well-respected Sacramento firm and Charles Post, the lawyer they have designated to represent Councilmembers, is a reputable and experienced litigator with experience in public records matters. My office will coordinate with Mr. Post to avoid duplication of effort and to handle this dispute as efficiently as possible. Accordingly, the City Manager retained Mr. Post and I recommend the Council approved the attached resolution to ratify that agreement.

Discussion

In January and February of this year, Karl Olson, counsel for Victoria Connolly and the California First Amendment Coalition (CFAC) sent to the City Public Records Act ("Act") requests for City Councilmembers' personal emails which were never prepared, owned, used or retained by the City. The City responded by providing all emails and documents to Mr. Olson, withholding or redacting a few to protect privileged information and to protect the privacy rights of City residents who have not made themselves public figures. Councilmembers declined to release their personal email so as not to force every citizen who interacts with them to be a public figure subject to the kinds of harsh

language common on the internet, to encourage citizens to interact with their elected officials and to ensure Councilmembers have the benefit of citizen input. On June 1, 2012, a lawyer representing Ms. Connolly and CFAC sued the City to test the application of the Public Records Act to Councilmembers' personal email. The lawsuit, *Connolly v. City of Auburn* (Placer Superior Court Case No. SCV0031261), names the City and all five Councilmember as defendants.

Government Code § 995 requires the City to defend and indemnify a Councilmember who is sued for an act or omission in his or her service to the City. This lawsuit arises from the Councilmembers' roles as City officials, and therefore the City must defend them.

Although the City's interests and the individual Councilmembers are largely aligned in this litigation, I recommend separate counsel for the Councilmembers to ensure that no conflicts of interest arise that might require new counsel to be hired in the middle of the case at significant cost and delay. Therefore, I recommend the City hire another firm to represent the Councilmembers. In particular, I recommend the firm of Weintraub, Genshlea, Chediak, Tobin & Tobin for their skill, professionalism, and expertise in this area of the law.

The City Manager has executed the attached retainer agreement subject to the Council's ratification.

Alternatives and Financial Implications

We have discussed these matters in closed session and it is not appropriate to discuss them in open session, where they will aid the plaintiffs in the suit.

Recommendations and Conclusion

Accordingly, I recommend you:

1. Review the attached agreement with Weintraub, Genshlea, Chediak, Tobin & Tobin to represent Councilmembers in *Connolly v. City of Auburn*.
2. Waive full reading and adopt the attached Resolution to authorize legal representation of Councilmembers.

If I can provide further advice or assistance in the meantime, please let me know.

Attachments: Resolution Authorizing Legal Representation of Councilmembers in
Connolly v. City of Auburn.
Agreement with Weintraub, Genshlea, Chediak, Tobin & Tobin

1 RESOLUTION NO. 12-

2 A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF AUBURN
3 AUTHORIZING LEGAL REPRESENTATION OF COUNCIL MEMBERS IN A
4 LAWSUIT

5 -----
6 THE CITY COUNCIL OF THE CITY OF AUBURN DOES RESOLVE:

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8 WHEREAS, the City of Auburn ("City") has received requests under the Public
9 Records Act for City Councilmembers' personal emails which were never
10 prepared, owned, used or retained by the City from counsel for Victoria
11 Connolly and the California First Amendment Coalition (CFAC); and

12
13 WHEREAS, the City has provided all of its own disclosable records to that
14 attorney but cannot provide personal materials of Councilmembers which do
15 not constitute public records; and

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17 WHEREAS, counsel for Ms. Connolly and CFAC asserts that Councilmembers'
18 personal email are subject to the Public Records Act and informs the City he
19 will soon file a lawsuit to test this question and intends to name the City and
20 the individual Councilmembers in the suit; and

21
22 WHEREAS, the lawsuit arises from the Councilmembers' service as members of
23 the City Council; and

24
25 WHEREAS, Government Code section 995 requires the City to defend and
26 indemnify a City employee, including a Councilmember, in any civil action or
27 proceeding brought against him or her due to an act or omission in the scope
28 of his or her service to the City; and

1 WHEREAS, the Fair Political Practices Commission ("FPPC") has opined that
2 because a City has a statutory duty to defend each Councilmember who is a
3 named defendant in a civil suit arising from an act or omission in the scope of
4 his or her service as a Councilmember, such Councilmembers have no
5 economic interest in the decision to hire counsel to provide that defense
6 (*Battersby* Advice Letter Aug. 12, 2002, FPPC File No. I-02-141); and
7

8 WHEREAS, the FPPC has advised that the decision to retain specific counsel for
9 individual Councilmembers relates to the terms or conditions of the
10 Councilmembers' service to the City and the Councilmembers therefore do not
11 have a disqualifying conflict of interest in the decision (*Battersby* Advice Letter
12 Aug. 12, 2002, FPPC File No. I-02-141; 2 Cal. Code Regs. § 18702.4(a)(3));
13 and
14

15 WHEREAS, providing such defense as required under Government Code 995
16 does not constitute a gift of public funds, and is instead an obligation imposed
17 on the City by state law;
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19 WHEREAS, the City Attorney has recommended that separate counsel be
20 provide for the Councilmembers while his office defends the City;
21

22 **NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF AUBURN**
23 **DOES HEREBY RESOLVE AS FOLLOWS:**
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25 SECTION 1: The foregoing recitals are each true and correct.
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27
28

1 SECTION 2: The letter agreement previously executed by the City
2 Manager to retain the law firm of Weintraub, Genshlea, Chediak, Tobin & Tobin,
3 LC to defend the Councilmembers in the anticipated suit is hereby ratified.

4
5 PASSED, APPROVED and ADOPTED this 11th of June 2012.

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8
9 _____
Kevin Hanley, Mayor

10
11 ATTEST:

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13
14 _____
15 Joseph G. R. Labrie, City Clerk

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17 I, Joseph G. R. Labrie, City Clerk of the City of Auburn, hereby certify
18 that the foregoing resolution was duly passed at the regular meeting of the
19 City Council of the City of Auburn held on the 11th day of June 2012 by the
20 following vote on roll call:

21
22 Ayes:

23 Noes:

24 Absent:

25
26 _____
27 Joseph G. R. Labrie, City Clerk
28

May 30, 2012

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 MERITAS LAW FIRMS WORLDWIDE

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Robert Richardson, City Manager
City of Auburn
1225 Lincoln Way, Room 9
Auburn, CA 95603-5004

RE: Fee Engagement Letter

Dear Mr. Richardson:

Thank you for asking us to represent Mayor Kevin Hanley, Mayor Pro Tem J. M. "Mike" Holmes and Councilmembers William Kirby, MD, Keith Nesbitt and Bridget Powers (hereinafter "the Clients") in defense of the matter titled: *Connolly, California First Amendment Coalition v. City of Auburn, et al.* We understand that the City Attorney and his colleagues will defend the City in this case and we will coordinate our work with his, to the extent permitted by our ethical obligations to the Clients, to handle this matter efficiently. This letter is to further confirm that the City of Auburn will bear the expense of the fees and costs incurred in our representation of the Clients. Until this fee engagement letter is approved by the City Council, our fees and costs will not exceed your signature authority of \$5,000. We are pleased to accept the assignment and this letter agreement sets forth the terms of our engagement. A new letter agreement may be required for future representation to expand or clarify the scope of our representation. Except as modified or expressed by any new letter, all legal services we perform will be on the terms described in this letter.

The current hourly charges for our attorneys are dependent upon the skill and experience of the individual involved. At present, the firm's hourly fees for attorney services range from \$195 to \$550. The current hourly charge for our paralegals and law clerks ranges from \$175 to \$200. I have agreed to provide my services at an hourly rate of \$300.00 and to charge no higher rate for any other of the firm's professionals without obtain the City's written consent.

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**weintraub genschlea chediak
tobin & tobin**

LAW CORPORATION

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I will be the principal attorney assigned to this matter. Subject to the supervisory role of the principal attorney, the Clients' work, or parts of it, may be performed by other lawyers and paralegals in the firm.

If our hourly rates are changed, the City of Auburn will be notified on its monthly billing statement. If you have or the City of Auburn has any questions concerning any new rates, please contact us immediately.

We will at all times act on our Clients' behalf to the best of our ability. Any expressions on our part concerning the effectiveness of certain strategies and courses of action or statements of opinion regarding the outcome of the Clients' legal matters are expressions of our best professional judgment, but are not guaranties.

We will bill monthly for all the legal services provided by our attorneys and other professional staff. In addition to hourly fees for services rendered, expenses incurred by us on the Clients' behalf will be billed to the City of Auburn. We generally will request that the City of Auburn pay costs directly or advance funds to us for payment of costs. Certain ancillary services such as computer research and photocopying will be billed based upon direct use.

Our billings are due and payable upon presentation. If the City of Auburn has any questions about any items on its statement, please contact us promptly. Interest will accrue on any unpaid balance beginning 45 days after the invoice date. The simple annual interest rate is ten percent. Upon receipt, amounts paid will be applied first to any accrued interest and then to the unpaid balance of expenses and fees. Should balances in the City of Auburn's account remain past due, its account will be reviewed by our management who will determine whether to continue with the representation or withdraw and pursue collection of your account. The City of Auburn agrees to pay any collection costs, including court and/or arbitration costs, filing fees and reasonable attorneys' fees.

We do not normally provide clients with an estimate of the total fees and costs that they will incur for our legal services in connection with a particular matter because the full scope of the efforts required to render appropriate services usually cannot be determined in advance and the work required to be done is often not completely within our control. For example, in the

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case of litigation, we frequently must respond to the actions of opposing counsel or other parties, and the range of appropriate responses is often dictated by the nature of those actions.

In some matters, the cost of legal services and/or claims against the Clients may be covered by insurance. The City of Auburn is responsible for giving us copies of all insurance policies and information that may be relevant to evaluating and obtaining insurance coverage in this matter. However, our compensation for all legal services rendered on the Clients' behalf shall not be dependent upon securing insurance coverage. In the event insurance is available but covers less than our billings, the City of Auburn will remain responsible for the full amount of our billed fees and costs.

Before undertaking the Clients' representation in this or any other matter, we may request the payment of an advance against fees and costs. We also may request the payment of advances from time to time as the matter progresses. The initial advance payment, as well as any future advance payments, will be held in our trust account. The City of Auburn authorizes us to use those funds from time to time to pay the fees and costs incurred as we proceed with your representation. Any funds remaining at the conclusion of this representation after payment of all fees and costs will be returned to the City of Auburn. Any interest earned on funds held in our trust account will be paid, as required by law, to the State Bar of California to fund legal services for indigent persons. California law will govern this letter agreement.

If any provision of this letter agreement is held to be unenforceable for any reason, the remainder of the letter agreement will be severable and will remain in effect.

The Client may terminate our representation at any time. We also reserve the right to withdraw from representation, including for nonpayment of fees or costs, misrepresentation or failure to disclose material facts and conflicts of interest with another client. We try to identify and discuss with our clients any situation that may lead to our withdrawal.

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We look forward to our engagement in this matter and appreciate the opportunity to provide these services. At all times please feel free to contact me to discuss any aspects of our representation, including staffing and billing matters. Please confirm the City of Auburn's agreement by having their representative sign a copy of this letter agreement and returning it in the envelope provided.

Very truly yours,

weintraub genshlea chediak
tobin & tobin
law corporation



Charles L. Post

CLP/rc

The terms of the engagement are approved.

Dated: _____, 2012.

CITY OF AUBURN

By: _____
Robert Richardson, City Manager

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